Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLIFFORD W. JONES, SR.
Petitioner

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Respondant

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

CLIFFORD W. JONES, SR.,
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6788

QUESTIONS PRESENTED FOR REVIEW

1. I experienced an indisputable break-in-service of more than 1 workday and acknowledged by the Agency before and on my 1st day (**Appendix D**), and 1998 is my 1st year of continuous service following my reappointment and exempt from **Part 432**, and I was terminated for my job performance solely during 1998, did MSPB-Denver abuse its discretion, by rejecting my motion for Summary Judgement as if my break-in-service had never occurred, and by holding a hearing based on my 1998 job performance and crafting its decision to identify Agency adherence to **Part 432** for 1998 as correct knowing that Agency documents identifying my 1998 job performance do not legally exist if I experienced a break-in-service of more than 1 day, and does omission of my material and pertinent break-in-service within the decision signify the finding of a predetermined result that is not in accordance with **Part 432**?

2. The Lower decision recognized my break-in-service, but arbitrarily upheld my wrongful termination under **Part 432** justified by my working into 1999, did the Lower Court abuse its discretion, by reaching an arbitrary decision based on a new issue that will never be legally applicable to me in 1999, because mandated 1999 PMRS standards were not prepared and issued, thus the Agency would never have Legal

Standing to apply **Part 432** to me in 1999, and does exonerating the Agency for not following mandated procedures in verbatim required by Law, Rule or **Part 432** conflict with prior Court decisions that found Agency's must prepare and issue PMRS standards in/for every year?

3. Indisputably, I made disclosures to DHHS-OIG and OSC of Anti-Deficiency Act violations and both, my disclosures and Letters of Reprimand issued to my supervisors, were identified as real events by testimony of the CFO, and this unsolicited testimony directly refuted OSC findings, did Lower Courts collectively abuse discretion both, by omission of the CFO's testimony and by inclusion of the rebuked OSC findings, and does omission of this substantial evidence place undue judicial bias toward me for Appeal of retaliation the Agency is mandated to provide me with while engaged in Whistle-Blowing activity?

TABLE OF CONTENTS

Questions presented for review..... i&ii
Table of authorities..... v&vi
Opinion below..... 1
Jurisdiction..... 1
Statue Involved..... 1
Preliminary Statement..... 1
Statement of the Case..... 2
Summary of the Argument..... 4
Argument..... 5

I. I EXPERIENCED AN INDISPUTABLE BREAK-IN-SERVICE AND WAS WRONGFULLY TERMINATED FOR MY JOB PERFORMANCE IN 1998, THERE IS NO QUESTION IN LAW ONLY THAT COURTS BELOW HAVE COLLECTIVELY ABUSED DISCRETION AND REFUSED TO RECOGNIZE MY EXEMPTION FROM **PART 432** DURING 1998..... **5**

II. CONGRESS ENACTED **CFR 5 CH. 1, PART 432** AND THE AGENCY HAS A MANDATE TO ABIDE BY CODIFIED REGULATIONS, AND THE LOWER COURTS ABUSED ITS DISCRETION BY DECIDING MY EMPLOYMENT INTO 1999 JUSTIFIED MY TERMINATION, IN SPITE OF DELIBERATE AND INTENTIONAL AGENCY NONCOMPLIANCE WITH **PART 432** IN 1999..... **6**

III. THE COURT ABUSED ITS DISCRETION, IMPOSING AN ARBITRARY VIEW, UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTRARY TO TESTIMONY OF THE CFO

TO ABET VIOLATIONS OF STATUTES SOLELY DESIGNED TO PROTECT ME FROM RETALIATION..... 9
Conclusion..... 12
Certificate of Service..... 13

Appendix:

A. Initial Decision issued by Denver-MSPB.
B. Final Decision issued by Merit Systems Protection Board.
C. Decision issued by United States Court of Appeals for the Federal Circuit.
D. Standard Form SF-50B NOTIFICATION OF PERSONNEL ACTION showing date when my break-in-service began.
E. Standard Form SF-50B NOTIFICATION OF PERSONNEL ACTION showing Agency acknowledgment of my break-in-service on the 1st day of my reappointment.

TABLE OF AUTHORITIES

CASES:

Sipes v United States, (1984 CA10 OKLA) 744 F.2d 1418..... 7

Special Counsel v Dept. Of Navy, (11/2/90) 46 MSPR 274..... 10

Wagner v EPA, (1991, MSPR) 51 MSPR 337, affd without op (1992, CA FC) 972 F.2d 1355..... 10

Weirauch v Department of Army, (1986, CA FC) 782 F2d 1560..... 8

JURISDICTIONAL STATEMENT:

Cross v Air Force, (12/12/84) MSPB Docket No. BN04328310121..... 7

Coltrane v Army, (12/21/84) MSPB Docket No. NY04328310492..... 8

Dawavendewa v Salt River, (11/97) United States 9th Circuit court of Appeals Docket No. 9715803..... 8

STATUTES & CODIFIED REGULATIONS:

5 U.S.C. Section 2301
ss2301(b)(2)..... 8 & 11
ss2301(b)(9)(A)(B)..... passim
5 U.S.C. Section 2302
ss2302(a)(2)(A)(vii)..... 11

ss2302(b)(1)(A)..... 8 & 11
ss2302(b)(8)(A)(i)(ii)(B)(i)(ii)..... passim
ss2302(b)(9)(C)..... passim
ss2302(b)(12)..... passim
CFR 5 Chapter 1:
ss432.101..... 7
ss432.102(b)(3)..... passim
ss432.(c)(e)..... 7
ss432(4)(i)(ii)(iii)..... passim

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit denying Mr. Clifford W. Jones, Sr.'s motion for wrongful termination and for protection from retaliation for Whistle Blowing activities appears at JONES v HHS, Docket Number 01-3153, ON APPEAL from the Merit Systems Protection Board CASE No. DE0432990348-I-1.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this Petition for a Writ of Certiorari pursuant to appeal of United States Court of Appeals for the Federal Circuit, decided August 08, 2001.

STATUTES INVOLVED

CFR 5, Ch.1, Part 432-Performance Based Reduction in Grade and Removal Actions, ss-432.102(b)(3) in 1998; and, **5 USCS Section 4302-Performance Based Reduction in Grade and Removal Actions, ss4302(b)(2) in 1999;** and, **5 USCS Section 2302-Prohibited Personnel Practices, ss2302(b)(8)(A)(i)(ii)(B)(i)(ii)(9)-(C)(12).**

The Court may assess against the United States damages and other litigation costs reasonable incurred in any case under these sections in which the petitioner has substantially prevailed.

PRELIMINARY STATEMENT

I Clifford W. Jones, Sr., brought this action Department of Health and Human Services because I was wrongfully terminated resulting from Whistle Blowing activities protected under **5 U.S.C. ss2302(b)(8)(A)(i)(ii)(B)(i)(ii)(9)(C)(12)** and denial of Due Process **(Appendix D&E)** either, as a result of my break in service of more than 1 workday by **CFR 5, Ch. 1, ss432.102(b)-(3)** in 1998 and as a result of the Lower Decision by **5 USCS ss302(b)(2)** in 1999. The United States Court of Appeals for the Federal Circuit denied my request for reinstatement of employment and protection from retaliation while engaged in Whistle Blowing activities. I am now petitioning for a Writ of Certiorari.

STATEMENT OF THE CASE

I, Clifford W. Jones, Sr., a reappointed Budget Analyst serving at the Fort Yuma Service Unit, DHHS/IHS, and was denied Due Process and wrongfully terminated for job performance during 1998, in retaliation for Whistle-Blowing activities.

Congress granted my entitlement to exemption from **Part 432** solely in 1998, this is the 1st year of service following reappointment after a break-in-service of more than 1 workday and the Agency clearly acknowledged this on my SF-50. My break-in-service and statutory exemption are both indisputable the Agency and Courts have in-lock-step ignored them in order to prevent me

from receiving a fair and impartial hearing.

After discussion with my supervisor about violations, I was given permission to continue. In December 1997 I reported Area Office's are Wasting Federal Funds in excess of $500,000 per year.

In May 1998 after discussion with my supervisor about violations, he admitted responsibility but challenged me to report him. I disclosed that my immediate supervisors were engaged in Anti-Deficiency violations in excess of $350,000.

I was unaware that my immediate supervisors received Letters of Reprimand until the Court and I were both informed by the Phoenix Area Office **CFO**, at the MSPB-Denver hearing. **OSC** was told deliberate and intentional lies and my disclosures were falsely identified as Standard Operating Procedure. Solely as a result of this bold face lie, **OSC** determined that if there is No Harm, there is No Foul.

As a result of unsolicited and undisputed testimony by the Phoenix Area Office-**CFO** and because **OSC** did not want to expend funds to investigate, **OSC** was placated by the Agency's verbal garbage. When in fact Anti-Deficiency Act violations did occur and Letters of Reprimand would later be issued to my supervisors.

During November 1998, my Waste violations were investigated along with the Anti-Deficiency violations, but the Agency balked about passing the Lie to DHHS-OIG and finally issued the

Letters of Reprimand to avoid damage to higher ups. In November 1998, the Agency ordered computer software to rid the Waste I disclosed, but deliberately did not implement corrections until 2 weeks after my termination, and forced me to suffer disparate treatment for my Whistle-Blowing activities.

The Agency and MSPB-Denver appear to have conspired to issue a decision as if I had not experienced a break in service. The fact both, my motion of Summary Judgement was denied and my indisputable Break in service was omitted from the MSPB-Denver decision, is proof that I did not receive a fair and impartial hearing as a result of deliberate and intentional individual action. Only a predetermined finding was obtained without following procedure required by Law, Rule and not in accordance with **Part 432**.

Congress granted exemption from **Part 432** for 1998, it is my 1st year following reappointment. Agency documents that reflect adherence to **Part 432** in 1998 do not legally exist. I am a Career-reappointed employee and not subject to the Legal application of **Part 432** before January 01, 2000.

SUMMARY OF ARGUMENT

There is no Legal Standing for my termination or for any prior decisions that should be based in Law. I beseech the Court to uphold and apply the Law to my specific circumstance and to me.

Congress granted 3 separate employee entitlements and all were ignored by the Agency and Courts to reach arbitrary decisions obtained without following procedure required by Law, Rule or Regulation and not in accordance with the Law, as follows:

1. Indisputably, I had a break-in-service of more than 1 workday, the Agency is mandated to exempt me from **Part 432** for 1998 and Legal Standing to apply **Part 432** to me in 1998 does not exist.

2. Indisputably, I worked into 1999, thus the Agency is mandated to prepare and issue 1999 **PMRS** standards and these were not prepared or issued, thus Legal Standing to apply **Part 432** to me in 1999 will never exist.

3. Indisputably, the Agency is mandated to protect me from retaliation and Anti-Deficiency Act violations did occur. The Agency issued my supervisors reprimands and they retaliated.

As a result of my faith in the Legal process but more so, the order and timing of events, I failed to cite Statutes or Legal precedents in my defense. It is indisputable the Agency does not have Legal Standing to apply **Part 432** to me in 1998, and without Agency Legal Standing, MSPB-Denver could not legally conduct a hearing on my 1998 job performance, because 1998 **PMRS** documents do not legally exist. **(Appendix D&E)**

I was removed for 2 reasons, my Whistle-Blowing activities directed toward Waste within

the Agency and the reported Anti-Deficiency Act violations by my supervisors. The Agency, in haste to eliminate objection to improper and illegal actions, deliberately and intentionally ignored my 1998 exemption from **Part 432**, granted by Congress. A Congressional exemption is not subject to Agency consideration or deliberation and I had expected MSPB-Denver to conduct fair and impartial hearings. But Courts continue to identify 1998 **PMRS** documents, that Legally do not exist, as applicable to me for 1998.

ARGUMENT

I. I EXPERIENCED AN INDISPUTABLE BREAK IN SERVICE AND WAS WRONGFULLY TERMINATED FOR MY JOB PERFORMANCE, THERE IS NO QUESTION IN LAW, ONLY THAT COURTS BELOW HAVE COLLECTIVELY ABUSED DISCRETION AND REFUSED TO RECOGNIZE MY EXEMPTION FROM PART 432 DURING 1998.

By enacting CFR 5 Ch.1, **Part 432** Congress identified the verbatim procedures necessary to legally apply **Part 432** and specific exemptions. I was wrongfully terminated for my job performance during 1998 under **Part 432**. But, I could not violate **Part 432**, because Congress exempted me in 1998, as a result of my break in service of more than 1 workday. Agency documents that reflect 1998 **PMRS** standards do not legally exist, contra to deliberate and

intentional misrepresentations.

The Agency most assuredly recognized my break in service, noting in Block 5B Nature of Action, I am a REINS-CAREER employee (**Appendix E**). Indisputably signifying my break in service is recognized at day 1, thus my termination was obtained and upheld by not following verbatim procedure required by Law. Rule and not in accordance with **CFR 5, Ch.1, Part 432**.

The Lower Court abused its discretion, by first representing **PMRS** documents as Legally applicable to me, contra to the fact that 1998 **PMRS** documents do not Legally exist, and justified my termination without requiring the Agency to follow procedure required by Law, Rule and the justification is unsupported by substantial evidence and not in accordance with **CFR 5 CH.1, ss432.102(b)(3). (Appendix D&E)**

II. CONGRESS ENACTED CFR 5 CH. 1, PART 432 AND THE AGENCY HAS A MANDATE TO ABIDE BY CODIFIED REGULATIONS, AND THE LOWER COURT ABUSED ITS DISCRETION AND DECIDED MY EMPLOYMENT INTO 1999 JUSTIFIED MY TERMINATION IN SPITE OF DELIBERATE AND INTENTIONAL AGENCY NONCOMPLIANCE WITH PART 432 IN 1999.

The decision below identified my break-in-service but ignored my exemption during 1998 and arbitrarily justified my termination because

I worked into 1999. Illegal personnel action in 1999 has not been raised, but the Lower decision directly conflicts with prior decisions and not in accordance with **Part 432**, and this new perspective and arbitrary justification must be addressed.

The Performance Management and Recognition System (**PMRS**) documents will always identify and solely apply to 1998, never 1999. I most certainly could not violate **Part 432** by working into 1999, I am the sole employee for whom the Agency did not prepare or issue 1999 **PMRS** standards. Lower Courts know these documents do not exist and this decision conflicts with prior decisions and all have solidified that verbatim compliance with **Part 432** is not an Agency option, but an Agency mandate. The Lower decision appears constructed to absolve the Agency for not following verbatim procedure required by Law, Rule or Regulation, not in accordance with **CFR 5, ss432.101 or ss432.103(c)(e)**.

As a Constitutional issue the Lower decision conflicts with "**Career appointments and Career conditional appointees must serve one year probationary period before termination procedures outlined in 5 USCS, ss4303 apply**", Sipes v. United States (1984 CA10 OKLA) 744 F.2d 1418. Thus, because of my break in service, the 1st day for the Legal application for **Part 432** begins January 01, 2000.

The Lower decision conflicts with "**Failure to issue valid performance standards violates important substantive rights employee must be made aware of performance of their positions**" Cross v. Air Force (12/18/84) MSPB Docket No. N04328310121.

Also, by **5 USCS 4302(b)(2) "Employee has right to be made aware of critical elements and standards by which performance is to be evaluated at beginning of appraisal period which forms basis of adverse action"**, Weirauch v. Department of Army (1986, CA FC) 782 F.2d 1560.

Plus, the Agency is mandated to provide advance notice, based solely on 1999 **PMRS** standards that were not prepared or issued, for both, a proposed removal and the final decision and Courts know both documents for 1999 do not physically exist.

Lower decisions conflict with "**Employee is entitled to notice of proposed removal and notice of decision where removal is based upon unacceptable performance**" Coltrane v. Army (12/21/84) MSPB Docket No. NY043283104-92. I was forced to suffer disparate treatment because my termination was obtained without following procedure required by Law, Rule or Regulation and not in accordance with **5 U.S.C., ss-2302(b)(12)**.

I am the sole Chickasaw and reemployed Budget Analyst for whom 1999 **PMRS** standards were neither prepared or issued, this illegal

personnel actions resulted in disparate treatment toward my Race and was wrongfully terminated for Whistle-Blowing activity, in violation of **5 U.S.C. Sections 2301(b)(2)(9)(A)-(B)** and **2302-(b)(1)(A)(8)(A)(i)(ii)-(B)(i)(ii)(12)**. Court decisions directly conflict with the U.S. 9th Court of Appeals determination, in **Dawavendewa v. Salt River - 9715803**, that my Tribal membership is Legal Standing for discrimination.

III. THE COURT ABUSED ITS DISCRETION, IMPOSING AN ARBITRARY VIEW, UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTRARY TO TESTIMONY OF THE CFO, APPEARING TO ABET THE VIOLATIONS OF STATUTES THAT ARE SOLELY DESIGNED TO PROTECT ME FROM RETALIATION.

My disclosures of Anti-Deficiency Act violations resulted in a whitewash by OSC and a genuine investigation by DHHS-OIG. Both, the Agency and my supervisors retaliated, denied me Due Process and I was wrongfully terminated. I reported to **OSC**, but it refused to act on my complaint of Waste, by finding if there is No Harm there is No Foul. This occurred because my supervisors and Phoenix Area Office officials misrepresented a blatant violation of the Anti-Deficiency Act as a Standard Operating Procedure.

Both, my disclosures and the disciplinary actions taken toward my supervisors, were

proven true by testimony of the **CFO**, after the **OSC** findings were issued. This testimony is diametrically opposed to **OSC** findings as a result of Agency misrepresentations, thus **OSC** findings, contra to Lower Courts representations, clearly show that decisions are arbitrary, an abuse of discretion, and not in accordance with Merit Systems Principles nor with Prohibited Personnel Practices, and rebuked by substantial evidence, the unsolicited and undisputed testimony by the **CFO**. This in totality refutes, placid and unsupported by substantial evidence, findings issued by **OSC**. A much different finding would have resulted if truthful information had been relayed about Anti-Deficiency Act violations and Reprimands issued.

Prior to my initiated DHHS-OIG investigation, the Agency balked and issued Reprimand to my supervisors for a $350,000 Anti-Deficiency Act violation and they retaliated. All Courts ignored the **CFO**'s undisputed testimony and this omission of substantial evidence within the decision abets the Agency's illegal personnel actions, thus my termination was obtained without following procedure required by either, **5 USCS Sections 2301(b)(9)(A)(B)** or with **2302(b)(8)(A)-(i)(ii)(B)(i)(ii)(9)(C)(12)**.

Lower decisions conflict with "**Employee who does not engage in protected activity may nevertheless be covered by Whistle-blower Protection Act where retaliatory personnel**

action is taken against employee based on belief that employee had engaged in protective activities." Special Counsel v. Dept. Of Navy (11/2/90) 46 MSPR 274.

This is applicable, because until now the Agency and Lower decisions reflected that my Whistle-blowing activities were not protected, although DHHS-OIG conducted an investigation based on my disclosures, my supervisors were issued Reprimands for Anti-Deficiency Act violations and I was rated unacceptable under **Part 432** although I am exempt from **Part 432** in 1998: and,

By these factors the Lower decision conflicts with the finding of "**Short period of time elapsed between employee's protected disclosure and the Agency's performance evaluation do not establish that employee's whistle blowing was contributing factor in his evaluation since timing of evaluation was in no way within control of Agency officials alleged to have retaliated against employee.**" Wagner v. EPA (1991, MSPB) 51 MSPR 337, affd without op (1992, CA FC) 972 F.2d 1355.

The finding specifically identifies retaliation I suffered, the misrepresentation of applicability for **Part 432** began 1 month after I disclosed Anti-Deficiency Act violations, and the timing for evaluation of my job performance is entirely within control of the Agency, because I am exempt from **Part 432** in 1998.

I reported that Waste was occurring in excess

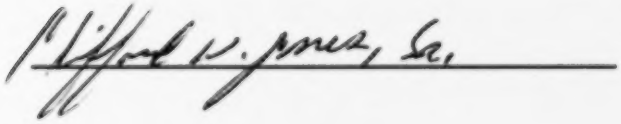
of $500,000 per year. This was reported to DHHS-OIG, and the Agency retaliated. The DHHS-OIG investigation I initiated addressed both issues, but implementation for this correction was delayed until 2 weeks after I was wrongfully terminated, thus my termination was obtained without following procedure required by either **2301(b)(2)(9)(A)(B)** and **2302(a)(2)(A)-(vii)(b)(1)(A)(8)(A)(i)(ii)(B)(i)(ii)(9)(C)(12)**. DHHS-OIG did not issue a final report nor has any Court referenced other reports, solely a report by **OSC** based on misrepresentation, that is rebuked by substantial and indisputable evidence, testimony by the **CFO**.

CONCLUSION

I pray, for the foregoing reasons, **the decision of the United States Court of Appeals for the Federal Circuit denying my motion for reemployment**, pursuant to both, **CFR 5, Ch.1, ss-432.102(b)(3)** in year 1998, and to **5 USCS 4302(b)(2)** in year 1999, **and for protection from retaliation while engaged in Whistle-Blowing activities**, pursuant to **5 U.S.C. Sections 2301(b)(9)(A)(B)** and to **2302(b)(8)(A)-(i)(ii)(B)(i)(ii)(9)(C)(12)**, **should be reversed**, and **Order** my reinstatement and Duty Station at the Acoma, Canoncito and Laguna Service Unit, and the case remanded for MSPB-Central to determine damages and fees.

Respectfully submitted,

Clifford W. Jones. Sr., pro se



Date submitted: February 20, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT 3 FULL AND COMPLETE COPIES OF THE ENCLOSED DOCUMENT WAS SENT BY REGULAR MAIL ON THIS DATE TO THE PERSON IDENTIFIED BELOW.

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February 20, 2002
DATE

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

CLIFFORD W. JONES, Appellant,	)	DOCKET NUMBER DE-0432-99-0348-I-1
V.	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency,	)	DATE: May 4, 2000

Clifford W. Jones, Whiteriver, Arizona, pro se.
William S. Latham, Phoenix, Arizona, for the agency.

BEFORE
Joseph H. Hartman
Chief
Administrative Judge

INITIAL DECISION

The appellant timely seeks review of the agency's action removing him from the position of Budget Analyst, GS-560-09, Indian Health Service (IHS), Fort Yuma Service Unit, Yuma, Arizona, effective March 5, 1999. The appellant is entitled to appeal the removal action to the

Board. **5 U.S.C. ss4303(e), 7701(a)**, and **5 C.F.R. ss1209.3(2)**. At the appellant's request, a hearing was held on January 11, 2000, in Phoenix, Arizona. The record closed at the completion of the hearing.

For the reasons set forth in this decision, the agency's decision to remove the appellant is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed unless otherwise stated. The appellant began his employment with the agency as a Budget Analyst in November 1997. IAF, Tab 5(4p). The appellant was the first employee to fill the position at the Fort Yuma Service Unit. See IAF, Tab 5(4q) (Position Description for Budget Analyst dated May 29, 1997). "The agency discussed with the appellant his performance plan and standards for the period covering January 1, 1998, through December 31, 1998. On July 30, 1998, James Battese, Administrative Officer and the appellant's immediate supervisor, notified the appellant, in writing, that his performance was unacceptable in five of the critical elements of his performance standards. The letter further informed the appellant of what was necessary for him to reach an acceptable level of performance in all five critical elements and gave him 90 days from the date of the letter to achieve that level of

performance. IAF, Tab 5(4m). On February 3, 1999, the agency issued a notice of proposed removal to the appellant based on his continuing unacceptable performance in three of the five critical elements identified in the letter set out above. The appellant filed a reply on February 18, 1999, and on February 23, 1999, the agency issued its decision affirming the proposed action. IAF, Tabs 4(4h, 4d, and 4c).

Thereafter, the appellant filed a timely complaint on the removal action with the Office of Special Counsel (**OSC**) alleging that the action was taken as reprisal because of his whistle-blowing activities. On July 13, 1999, **OSC** notified the appellant that it was closing its file on his complaint and of his right to seek review and or corrective action from the Merit Systems Protection Board. On August 16, 1999, the appellant timely filed the instant appeal with the Board. IAF, Tab 1. This matter has been accepted for review as a performance-based action.

The agency has met its burden of proof with regard to the performance issues in this appeal.

To sustain a Chapter 43 performance-based removal action, the agency must prove several elements by substantial evidence. *See* **5 U.S.C. ss7701(c)(1)(A); 5 U.S.C. ss4302-03**; Martin *v. Federal Aviation Administration*, 795 F.2d 995, 997 (Fed. Cir. 1986). First, the agency must show that the Office of Personnel Management

(**OPM**) approved its performance appraisal system or plan. *See Martin*, 795 F.2d at 997; *Griffin v. Department of the Army*, 23 M.S.P.R. 657, 663 (1984). Second, the agency must show that the written performance standards and critical elements of the position were communicated to the appellant at the beginning of the appraisal period upon which the personnel action was based. Third, the agency must show that it warned the appellant of inadequacies in the critical element during the appraisal period. Fourth, the agency must show that the appellant was counseled and afforded a reasonable opportunity for improvement after proper notice. *Martin*, 795 F.2d at 997. Finally, the agency must prove that in spite of the opportunity to improve, the appellant's performance was unacceptable because he failed to meet the established performance standards in one or more critical elements of his position. *See* **5 U.S.C. ss 4301(3) and 4303(a)**; *see also, Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986).

The agency's performance appraisal system was approved by OPM.

The agency has in place an OPM approved agency-wide performance appraisal system or plan that the agency adhered to in developing the critical elements and performance standards for the appellant's position. Appeal File, Tab 5-

(4r). IHS is covered by OPM's approval of the agency-wide performance appraisal system. *See Scillion v. Department of Health and Human Services*, 45 M.S.P.R. 521, 525 (1990) (approval of an agency-wide performance appraisal system is sufficient to cover its

1 Substantial evidence is the "degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. ss1201.56(c)(1).

subcomponents' systems, when the subcomponents' systems are developed in accordance with the agency-wide system). Therefore, I find that the agency has established by substantial evidence that its performance appraisal system was approved by OPM. See *Griffin*, 23 M.S.P.R. at 663.

The performance standards and critical elements of the position were communicated to the appellant at the beginning of the appraisal period.

To establish the second factor of this Chapter 43 action, the agency must show that the performance standards and critical elements were communicated to the appellant at the beginning of the appraisal period upon which the personnel action was based. *See* **5 U.S.C. ss4302(b)-(1)**; *Weirauch V. Department of the Army*, 782 F.2d 1560, 1563 (Fed Cir. 1986) (the

Board has interpreted **ss4302(b)(2)** as giving an employee the substantive right to be made aware of the critical elements and standards by which his performance is to be evaluated at the beginning of the appraisal period which forms the basis of the personnel action; however, the period of appraisal of an employee for purposes of a personnel action; however, the period of appraisal of an employee for purposes of a personnel performance action and the agency's appraisal period need not coincide), *aff'd* 785 F.2d 320 (Fed Cir 1985). The agency must also show that the performance standards permitted the accurate evaluation of job performance on the basis of objective criteria. Performance standards may be more or less objective depending upon the job measured, but they must be sufficiently specific to provide a firm benchmark toward which the appellant must aim his performance, and not an elusive goal which the agency may find he met or failed to meet. *Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 298 (1985). However, a certain amount of subjectivity in performance standards is acceptable and necessary, especially where professional positions are involved. *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1055 (Fed Cir. 1985).

It is undisputed that the appellant was made aware of his performance standards and critical elements prior to the appraisal period. It is also undisputed that the agency based the removal

action solely upon alleged unacceptable performance by the appellant during the 90-day Performance Improvement Plan (PIP) period. I find, therefore, that the PIP period is the relevant appraisal period. The agency relied upon unacceptable performance under Critical Elements (CE) 1, 4, and 5; therefore, my review will be limited to those elements as well. IAF, Tabs 5(4m) and 4(4h).

Critical Element 1

CE 1 requires the appellant to maintain Service Unit Commitment Registers for all budget activities including: hospitals (01); reimbursements (09) private insurance(15) Medicare (21) Medicaid (22) maintenance and improvements (26); facilities support (28) and other financing activities as they become available.

Marginally successful or acceptable level of performance for CE 1 is achieved by the appellant when he maintains a Commitment Register by object class and common accounting number and record obligations incurred to appropriate account in accordance with Transmittal Notice 94-07. See IAF, Tab 19 (copy of TN 94-07). A monthly summary of transactions from each funding source Commitment Register must be submitted to the Service Unit (**SU**) Administrative Officer no more than eight working days after the preceding month and

with no more than four errors for each monthly Commitment Register. Reconciliation must be preformed and submitted to the **SU** Administrative Officer by the 20th day of the following month.

Critical Element 4

CE 4 requires the appellant to purge and adjust the Health Accounting System (HAS) reports and to review posted obligations to ensure accuracy. A marginally successful or acceptable level of performance for CE 4 is achieved by the appellant by reviewing the SHR 426-A for accuracy; comparing obligations on the 426-A with FYSU records and making notations on the 426-A with the noted adjustments to the SU Officer no less than eight working days after receipt of the monthly 426-A with no more than five errors or omissions on the adjustments.

Critical Element 5

CE 5 requires the appellant to gather, extract, review, consolidate and prepare a variety of financial data and other statistical information for various forms, schedules, and reports. A marginally successful or acceptable level of performance for CE 5 is achieved by meeting established deadlines set by a supervisor with no more than five deadlines missed, or five errors made for any particular assignment.

At no time has the appellant contended that

the agency failed to timely communicate his performance standards and critical elements to him. In fact, the record in this case clearly shows that the agency provided the appellant with the information soon after his appointment and up to and including the day he was placed on a PIP. Also, the appellant has not questioned the validity of the elements at issue in this appeal. I find, therefore, that the performance standards are appropriate in light of the position requirements, allow for objective evaluation of the appellant's performance, and were communicated to the appellant at the beginning of the PIP period which formed the basis for removing him.

The agency warned the appellant of inadequacies in Critical Elements 1, 4, and 5 during the appraisal period.

I find that the appellant was properly notified of his performance inadequacies in Critical Elements 1, 4, and 5. During the appraisal period, James Battese, Administrative Officer for the Fort Yuma Service Unit (FYSU) and the apellant's immediate supervisor, discussed with the appellant the requirements of CE 1, and the need to maintain the Commitment Register in accordance with Transmittal Notice (TN) 94-07. Battese testified that he provided the appellant with the necessary guidance and tools, and also instructed him to contact the Area Budget Office, if he needed assistance in implementing

commitment procedures. The same is true of CE 4 and 5. In addition to contacting the Area Budget Office, Battese also directed the appellant to seek assistance from the Property and Supply Officer regarding adjustments to the HAS report. Regarding CE 5, Battese stated that he instructed the appellant to contact the Phoenix Area Finance Office for assistance in completing the required monthly reports. According to Battese, these discussions took place prior to and during the PIP period. IAF, Hearing Tape No. 1 (testimony of Battese). Finally, the same performance deficiencies were detailed in the PIP notice dated July 30, 1998. IAF, Tab 5(4m). Accordingly, I find that the appellant received ample warning of the inadequacies in his performance under Critical Elements 1, 4, and 5.

The agency has shown that the appellant was counseled and afforded a reasonable opportunity for improvement after proper notice.

Regarding the fourth factor of this Chapter 43 action, I find that the appellant was counseled about his performance problems and how he could demonstrate improvement to an acceptable level. Battese testified that he and the appellant discussed his performance prior to July 30, 1998, and therefore, the appellant was aware of the need to maintain the Commitment Register, and to submit the type of reports required under CE 4 and 5. The PIP notice

provided the appellant with specific details about his performance problems and what he needed to do to show improvement. Battese also testified that he met with the appellant during the PIP to discuss the requirements of his standards and to make sure the appellant understood the importance of the referenced critical elements, and he still did not comply with the requirements of those elements. According to Battese, in order to assist and reinforce the importance of CE 1, he arranged for the appellant to receive additional training in that area during the PIP period. IAF, Hearing Tape No. 1, Side 1 (testimony of Battese). Based on the unrefuted testimony of Battese, I find that the PIP period of 90 days provided a reasonable opportunity for the appellant to show improvement under Critical Elements 1, 4, and 5.

I note that the appellant, in general terms, contended that he was not given sufficient training, but he did not provide any testimony or other evidence to support his contention. I also note that the agency is not required to provide the appellant with any formal training as part of affording him an opportunity to demonstrate acceptable performance. See Corbett v. Department of Veteran's Affairs, 59 M.S.P.R. 288, 290 (1993). However, the unrefuted testimony of Battese and Lovell Hopper, Financial Officer for the Phoenix Area Office, shows that the appellant received ample training

and assistance during the appraisal period. Hopper also testified that the appellant received initial training on preparing a Commitment Register In 1997, and attended a workshop and refresher course after receiving the initial training. He further stated that he personally gave training to the appellant on three separate occasions on how to prepare a manual Commitment Register. IAF, Hearing Tape No. 1, Side 1 (testimony of Battese); Tape No. 2, Side 2 (testimony of Hopper). Accordingly, I find that the appellant's contention of lack of training and assistance to be without merit.

Having made these findings, I conclude that the appellant was afforded a reasonable opportunity to improve his performance during the PIP period.

In spite of the opportunity to improve, the appellant failed to achieve an acceptable level of performance in critical Elements 1 and 2.

Having found that the agency correctly addressed the procedures applicable to this case, I will now consider the agency's charge that the appellant's performance remained unacceptable during the PIP period. The proposed removal set forth three reasons. Each reason involved a separate critical element.

Reason 1 is supported by substantial evidence.

Reason 1 involves CE 1. Battese testified that, from the time of his appointment, the appellant

never maintained the Commitment Register. Further, during the PIP period, the appellant, even after he had been instructed to do so, did not maintain the Commitment Register. Battese stated that he had discussed the necessity for maintaining the Commitment Register with the appellant on several occasions prior to the PIP, and specifically met with him during the PIP period to emphasize that the Commitment Register was an important part of CE 1 and he was not complying with the CE by failing to maintain it as required by TN 94-07. In view of his refusal to maintain the Commitment Register in the form required, Battese stated that his performance remained unacceptable during the PIP period. IAF, Hearing Tape No.1, Side 1 (testimony of Battese).

I note that the appellant has not challenged or argued that he did not fully understand the level of performance required for minimally successful or acceptable level of performance under CE 1. The appellant claims, however, that a Commitment Register for FYSU was prepared every month during the time in question. The appellant also does not deny that he was fully aware that Battese expected him to prepare a manual Commitment Register. The appellant readily concedes that he did not prepare a manual Commitment Register, but claims that an electronically produced report satisfied the requirement for a monthly Commitment Register; therefore, Battese's requirement that

he prepare a manual commitment Register was unnecessary. The appellant also argued that he was never provided with the necessary data to adequately prepare a manual Commitment Register. IAF, Tab1.

Battese stated that maintenance of a manual Commitment Register is necessary because the electronic report identified by the appellant is not a Commitment Register. Battese explained that the Commitment Register provided information on the balance of funds within FYSU on a daily basis, while the electronically produced report did not, and the type of information obtained through a Commitment Register was essential to the ongoing day-to-day operation of the unit. Battese's testimony was corroborated by Hortense Miguel, FYSU Director, and Hopper. Miguel, the appellant's second level supervisor and deciding official in this case, testified that she was aware of the appellant's contentions, and he was still instructed and expected to maintain a manual Commitment Register, and he did not. Hopper testified that the requirement for a manual Commitment Register was first established in 1994 and continued up to the day the appellant was removed. IAF, Hearing Tape Nos. 1-3 (testimony of Battese, Miguel, and Hopper).

After considering the evidence of record, I first note that the appellant did not testify at the hearing or offer any other evidence to support his contentions concerning this matter. Under

these circumstances, the sworn testimony of Battese, Miguel, and Hopper is entitled to more evidentiary weight than the unsworn statement of the appellant. See Frederick v. Department of Justice, 65 M.S.P.R. 517, 532-33 (1994) (unsworn statement regarding facts at issue is generally not as probative as live testimony concerning same matter); see also Martin, 795 F2d at 997 (when reviewing a testimony a performance-based action taken under 5 U.S.C., Chapter 43, the Board gives deference to the judgement by the agency of an employee's performance in light of the agency's assessment of its own personnel needs and standards). Since CE 1 required the appellant to maintain a manual Commitment Register, he was required to do so, and he did not. Accordingly, I find that his performance during that period was unacceptable on that particular element. Moreover, even if the electronic report was similar to the Commitment Register, it was not the appellant's responsibility to determine whether he could ignore or otherwise refuse to accomplish the requirements of CE 1. The requirements for a Commitment Register was a part of his performance standards; he was aware of it; he had been warned that he had to produce a manual Commitment Register, and he did not. Since I find the appellant's performance under CE 1 to be unacceptable by substantial evidence, Reason 1 is sustained.

Reason 2 is supported by substantial evidence.

Battese testified that CE 4 required the appellant to purge and adjust the Health Accounting System (HAS) Reports and also review posted obligations to ensure accuracy. According to the agency, to be marginally successful the appellant had to review SHR 426-A for accuracy, compare obligations on the 426-A with FYSU records and make notations on the 426-A for adjustments as necessary. A copy of the 426-A with noted adjustments was then submitted to the FYSU Administrative Officer no later than eight working days after receipt of the monthly 426-A with no more than five errors or omissions on the adjustments. During the PIP period, Battese stated that he received no adjusted SHR 426-A reports from the appellant. Battese pointed out that the appellant was solely responsible for the tasks set out in CE 4. IAF, Hearing Tape No. 1, Side 1 and 2 (testimony of Battese).

In response, the appellant contends that the Property and Supply Branch (PSB) had sole authority and ability to electronically deobligate funds. PSB's authority in this area had been fully functional at FYSU since 1997, and without the authority to electronically certify available funds, the appellant contends that he was unable to perform the tasks set out in CE 4. IAF, Tab1.

Contrary to the appellant's contentions, Battese testified that one of the reasons for

establishing the position filled by the appellant was to remove the task of purging and adjusting the HAS reports from PSB. Further, the appellant had full authority to make the necessary adjustments. Battese stated that the requirements of CE 4 were fully discussed with the appellant on several occasions, including during the PIP period, and therefore, the appellant was aware that he was solely responsible for performing the tasks of the element. Again, both Miguel and Hopper agreed with Battese that it was the appellant's responsibility under CE 4 to purge and adjust HAS reports monthly, and he did not. Hopper stated that this task must be accomplished monthly by the individual service units because the source documents are located in their offices. All three agency officials also agreed that the appellant was provided with sufficient guidance on how to accomplish the task, and that the preparation of the reports did not require him to have certification of available funds authority to do it. IAF, Hearing Tape Nos. 1 and 2 (testimony of Battese, Miguel, and Hopper).

Agin, I note that the appellant did not testify at the hearing on this issue, and he has not presented any other evidence of record, I find that the appellant was fully aware of the requirements of CE 4, and he was capable of purging and adjusting the reports during the time in question, and he did not. During the

processing of this matter, the appellant readily conceded that he did not perform the tasks set out in CE 4 for the reasons offered. Under these circumstances, I find that the appellant's performance under CE 4 during the PIP period was unacceptable. Accordingly, Reason 2 is sustained.

In sum, I find that the agency has shown by substantial evidence that the appellant's performance in critical elements 1 and 2 did not improve during the PIP period, but remained at an unacceptable level. **5 U.S.C. ss7701(C)(1)(A)**. Under these circumstances, I find it unnecessary to consider Reason 3 since unacceptable performance in just one critical element is sufficient to support the agency's action. Mabrouk v. Department of Treasury, 40 M.S.P.R. 149, 153 (1989)(agency must prove only that the appellant performed unacceptably in one critical Element of his position for the Board to sustain its removal of the appellant).

Consideration of the appellant's affirmative defense.

Having found that the PIP was conducted properly and having sustained the charge of unacceptable performance, I next consider any affirmative defenses raised by the appellant. The appellant first asserts that the agency's action is found on reverseable procedural error. He also asserts that the action was taken in retaliation for his whistle-blowing. Finally, the appellant

claims that his removal is based on prohibited discrimination.

The appellant has failed to show that the agency committed reversible error.

The burden is on the appellant to prove harmful error by a preponderance of the evidence. **5 C.F.R. ss1201.56(b)(1) and (c)(3)**; Scott v. Department of Justice, 69 M.S.P.R. 211, 242 (1995). In appealing this matter, the appellant claims that the agency failed to provide him with a representative at the time agency officials delivered to him the notice of proposed action and later the notice of decision. The appellant, however, has failed to identify the specific law, rule, or regulation under which he believes the agency denied him due process. Moreover, I am not aware of any requirement that the appellant was entitled to representation while he was being handed either a notice of proposed action or decision letter. Accordingly, I find his claim of procedural error to be without merit and will not receive any further consideration.

The appellant has not established that the agency retaliated against him because of his alleged whistle-blowing activities.

In determining whether reprisal for whistle-blowing activities occurred, an inquiry must be made into whether: (1) The appellant made a disclosure protected under **5 U.S.C. ss2303(b)-**

(8); (2) the disclosure was a contributing factor in the agency's personnel action; and (3) the agency can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Clark v. Department of the Army*, 997 F.2d 1466, 1470 (Fed Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994).

To establish that the listed disclosures are protected under WPA, the appellant must show or have reasonably believed that the disclosure(s) evidence a violation of law, rule, or regulation; or gross mismanagement or waste of funds, abuse of authority; or a substantial and specific danger to public health or safety. *See* **5 U.S.C. ss 2302(b)(8)**. The appellant claims that he made protected disclosures to: (1) Battese, his immediate supervisor, the Phoenix Area Office (PAO) Budget Specialist, and Office of the Inspector General (OIG) on or about December 27, 1997; (2) Battese on February 12 and sometime in April 1998; and (3) OIG on August 4, 1998. The appellant claims that the disclosures involve violations of law, rule, or regulation and gross mismanagement or waste of funds by FYSU or PAO officials when: (1) he was required to maintain the type of Commitment Register discussed previously in this decision; (2) the agency over-obligated appropriated funds for FY 97/98 with FYSU; and (3) the Indian Health Service's use of a decentralized financial management system

adversely affects health service delivery to the native people. IAF, Tab 13 (appellant's prehearing submission).

Assuming, arguendo, that the appellant's disclosures are protected under the WPA and were a contributing factor to the agency's decision to remove him, I find that the record contains clear and convincing proof that the agency would have removed the appellant absent the disclosures. *See Horton v. Department of the Navy*, 60 M.S.P.R. 397, 403-04 n.4 (1994)(Board may invert the review process by first considering whether the agency is able to show by clear and convincing evidence that it would have taken the same action even if the appellant's protected disclosures were assumed to be a contributing factor). I find the evidence of record clearly shows the appellant was performing at an unacceptable level in at least two of his critical elements. Miguel, Battese, and Hopper all stated that the need to preform the tasks set out in CE 1 and 4 were critical, if not essential, to insuring that FYSU operated within its budgetary requirements. These officials, at various times throughout his employment, informed the appellant of these facts, either directly or through the agency's training process, and he was instructed on more than one occasion of the necessity of preforming the tasks needed to reach an acceptable level of performance. Notwithstanding the agency's attempt to provide him with additional time to

reach an acceptable level of performance, the appellant did not even attempt to correct his deficiencies. Miguel testified that the appellant's repeated refusal to perform the critical elements of his performance standards left the agency with no alternative but to remove him.

Under these circumstances, I find that the agency has shown by clear and convincing evidence that it would have removed the appellant in the absence of his disclosures. Accordingly, I find that the appellant's claim of whistle-blowing retaliation is unsubstantiated by the evidence. 5 U.S.C. ss2302(b)(8).

The appellant has not shown that his removal was based on prohibited discrimination.

Other defenses raised by the appellant and accepted for review are his allegations of discrimination based on national origin (Native American), sex (Male), and age (47). If the appellant seeks to support his claim of discrimination on the basis of alleged disparate treatment, he must show that: (1) He is a member of a protected group; (2) he was similarly treated to an individual who is not a member of a protected group; and (3) he was treated more harshly than the individual who is not a member of the protected group. See Buckler v. Federal Retirement Thrift Investment Board, 73 M.S.P.R. 476, 497 (1997). If the appellant is able to establish a prima facie case, the burden shifts to the agency to articulate a

legitimate nondiscriminatory reason for the agency's action. If the agency is able to meet its burden, the burden shifts to the appellant's proffered explanation is pretext for discrimination. Carter v. Small Business Administration, 61 M.S.P.R. 656, 665 (1994).

If the appellant seeks to support his claim by direct evidence, he must show that membership in a protected category was a "motivating factor" in the action appealed. See Jones v. Department of the Army, 68 M.S.P.R. 398, 403 (1995). In establishing age discrimination, the appellant must show that his age was the determining factor in the action under review. See Browski v. Department of Agriculture, 61 M.S.P.R. 372, 374 (1989).

The undisputed evidence of record shows that the appellant falls within the protected groups related to his national origin, sex, and age. With respect to the order and allocation of proof concerning discrimination issues, the Board has held that when the agency has established a legitimate, nondiscriminatory reason for its action, questions of discrimination may be resolved by proceeding directly to the issue of whether the appellant has established that the agency's reason for the action is pretextual. *Nestro v. United States Postal Service*, 34 M.S.P.R. 242, 244 (1987); *Vincent v. Federal Deposit Insurance Corporation*, 41 M.S.P.R. 637, 640-41 (1989). In taking this action, the agency has demonstrated a legitimate,

nondiscriminatory reason for removing the appellant due to unacceptable performance in at least two of the critical elements of his assigned position.

The appellant asserts that the agency's reason for removing him is pretextual because other similarly-situated employees did not maintain Commitment Registers, and they were not disciplined. The undisputable evidence shows, however, that the two employees identified by the appellant, Ms. Tewafhaftewa and Ms. Yazzie were indeed Budget Analysts for other service units, but they were also required to maintain in accordance with their assigned duties and requirements of TN 94-07. In fact, Hopper testified that during the time in question, maintenance of a Commitment Register was essential to the on-going daily operation of all service units under the control of the Phoenix Area Office, and therefore, all service units were required to maintain Commitment Registers. IAF, Hearing Tape No. 2, Side 2 (testimony of Hoopper). I note that the appellant has not presented any evidence to show otherwise.

Accordingly, based on the evidence of record, I find that the appellant has failed to establish that the agency's reason for removing him was pretextual in nature. Accordingly, I find the appellant's allegations of national origin, sex, and age discrimination to be without merit and will not receive any further consideration.

Conclusion

Having sustained the charge of unacceptable performance based upon two separate critical elements, and having disposed of the appellant's affirmative defenses of harmful error, prohibited reprisal for whistle-blowing, and discrimination, I next look to whether the penalty of removal was appropriate. Although the Board may mitigate penalties imposed by an agency on employees for misconduct under 5 U.S.C. Chapter 75, that authority does not extend to the demotion or the removal of an employee for unacceptable performance under the provisions of 5 U.S.C. Chapter 43. Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558, 1565-66, cert. denied, 106 S.Ct. 1514 (1986). In this case, the removal penalty imposed by the agency was accomplished pursuant to the provisions of Chapter 43. Therefore, the agency's choice of penalty is nonreviewable and may not be disturbed by me.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: S/_____
Joseph H. Hartman
Chief Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on June 8, 2000, unless a petition for review is filed by

that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition within 30 days after you receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instruction are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws. Regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will

obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, FAXed, or hand-delivered no later than the date this initial decision becomes finial, or if this initial decision is received by you more than 5 days the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, FAXed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's finial decision on discrimination, you may obtain further administrative review by filing a petition with EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both

discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in **42 U.S.C. ss2000e-5**. If you file a civil action with the court, you must name the head of the agency as the defendant. See **42 U.S.C. ss 2000e-16(c)**. To be timely, your civil action under the Civil Rights Act, **42 U.S.C. ss2000e-16(c)** must be filed no later than 30 days calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in **29 U.S.C. ss-633a(c)**. In some, but not all districts you may have up to 6 years to file such a civil action. See **28 U.S.C. ss2401(a)**.

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before the decision becomes final. To be timely, your petition must be received by the

court of appeals no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DE-0432-99-0348-I-1

CLIFFORD W. JONES, SR.,
Appellant,
v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Agency.

DATE: December 14, 2000

Clifford W. Jones, Sr., Whiteriver, Arizona, pro se.
William S. Latham, Phoenix, Arizona, for the agency.

BEFORE

Beth S. Salvet, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that

was not available for consideration earlier or when the administrative judge made an error interrupting the law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 CFR ss1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. ss-1201.115(d). Therefore we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. ss1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Code, section 7702-(b)(1) (5 U.S.C. ss7702(b)(1). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations

P.O.Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 days after your receipt of this letter. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and other claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. ss7703(b)(2). You must file your civil action with the district court no later than 30 calender days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. ss2000e5(f); 29

U.S.C. ss794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calender days after your receipt of this order. If you have a representative in this case, and your representative receives this letter before you do, then you must file with the court no later than 60 days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your

right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. ss7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: S/_____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

01-3153

CLIFFORD W. JONES, SR.,
Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Respondent.

DECIDED: August 8, 2001

Before RADER, BRYSON, and DYK, Circuit Judges.

PER CURIAM.

Clifford W. Jones, Sr., petitions for review of the December 14, 2000, final order of the Merit Systems Protection Board (Board), No. DE-0432-99-0348-I-1, upholding the Department of Health and Human Services' (agency's) removal

of Mr. Jones from employment. Because Mr. Jones has not demonstrated that the Board erred in upholding the agency's action, this court affirms.

The agency hired Mr. Jones as a Budget Analyst on November 23, 1997. Mr. Jones' employment with the agency was subject to an appraisal period from January 1, 1998 through December 31, 1998, based on a performance plan and standards. In July 1998, Mr. Jones' supervisor notified Mr. Jones in writing that his performance was unacceptable in five critical elements of his performance standards. This notification also informed Mr. Jones that he had to reach an acceptable level of performance within ninety days. On February 3, 1999, the agency issued a notice of proposed removal to Mr. Jones based on his continued unacceptable performance. On February 23, 1999, the agency removed Mr. Jones.

Mr. Jones filed a complaint under 5 U.S.C. ss-2302(b)(8) with the Office of Special Counsel, alleging that the agency removed him as reprisal for his whistle-blowing activities. On July 13, 1999, the Special Counsel notified Mr. Jones that it was closing his file. The Special Counsel found that Mr. Jones did not show any nexus between his alleged whistle-blowing activities and his removal. The Special Counsel, therefore, concluded that the agency had not violated the whistle-blowing statute.

Mr. Jones appealed to the Board. In his

appeal, Mr. Jones faulted the agency's procedure. Mr. Jones further claimed that the agency removed him in retaliation for whistle-blowing. Finally, Mr. Jones asserted that his removal was based on prohibited discrimination.

The administrative judge found that the agency had met its burden of proof with regard to Mr. Jones' performance issues, that Mr. Jones' claim of procedural error was without merit, and that the agency would have removed Mr. Jones in the absence of his ss2302(b)(8) protected disclosures. Mr. Jones petitioned the full Board for review. The Board dismissed his appeal for failure to meet the criteria for review under 5 C.F.R. ss1201.115.

II.

This court has limited review of Board decisions. This court affirms a Board decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedure required by the law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. ss7703(c); Cleveland v. Office of Pers. Mgmt., 984 F.2d 1193, 1194 (Fed. Cir. 1993). In reviewing the present appeal, this court function is to determine whether the Board's findings are supported by substantial evidence; this court does not review the facts afresh. Beavens v. Office of Pers. Mgmt., 900 F.2d 1558, 1565 (Fed. Cir. 1990).

On appeal to this court, Mr. Jones alleges the Board did not consider the agency's retaliation to his whistle-blowing activities as the reason for his removal. The administrative judge fully evaluated evidence of Mr. Jones' performance and found that Mr. Jones was performing at an unacceptable level in at least two of his critical elements. The administrative judge thus properly concluded that the agency would have removed Mr. Jones absent any protected disclosures. Clark v. Dep't of Army, 997 F.2d 1466, 1469- 1470 (Fed Cir. 1993) (agency can refute allegation of reprisal for whistle-blowing activities by providing by clear and convincing evidence that it would have taken the same personnel action in the absence of any protected disclosures).

Mr. Jones further alleges that before he was employed by the agency, he had a break in Federal service of greater than one day. According to Mr. Jones, this break in service precludes the Board from removing him under 5 U.S.C. chapter 43 or 5 C.F.R. part 432. To support this allegation, Mr. Jones cites to 5 C.F.R. ss432.102(b)-(3) which states that removals under chapter 43 and part 432 do not apply to " an employee in the competitive service . . . who has not completed 1 year of current continuous employment in the same or similar position." The record, however, clearly establishes that Mr. Jones had worked for the agency for more than one year before the agency

removed him.

This court has considered Mr. Jones' remaining assertions and finds them to be equally without merit.

Standard Form SF-50B

NOTIFICATION OF PERSONNEL ACTION

1. Name
Jones, Sr., Clifford W.

2. Social Security Number
444-52-3825

3. Date of Birth
08-24-51

4. Effective Date
01-16-96

FIRST ACTION

5-A. Code 312	5-B. Nature of Action Resignation-ILIA
5-C. Code RTM	5-D. Legal Authority REG. 715.202 RIF
5-E Code	5-F. Legal Authority
6-A. Code	6-B. Nature of Action
6-C Code	6-D. Legal Authority
6-E. Code	6-F. Legal Authority

7. FROM: Position Title and Number
Accountant
EEO221 -00612

8. Pay Plan GS	9. Occ. Code 0514
10. Grade Level 11	11. Step/Rate 04
12. Total Salary $38,479	13. Pay Basis PA

14. Name and Location of Position's Organization
Juneau Area Office
Asst Area Director for Admin
Branch of Financial Management

Accounting Section
Juneau, Alaska
15. TO: Position Title and Number
16. Pay Plan 17. Occ. Code
18. Grade Level 19. Step/Rate
20. Total Salary 21. Pay Basis
22. Name and Location of Position's Organization

EMPLOYEE DATA

23. Veterans Preference
1-None
24. Tenure
1-Permanent
25. Agency Use
M-Sex
26. Veterans Preference for RIF
X-No
27. FEGLI
L-Basic Life & Family Option
28. Annuitant Indicator
29. Pay Rate Determinant
g-Not Applicable
30. Retirement Plan
K-FERS and FICA
31. Service Comp. Date
08-12-91
32. Work Schedule
F-Full Time

POSITION DATA

34. Position Occupied
1-Competitive Service
35. FLSA Category
E
36. Appropriation Code
37. Bargain Unit Status
0065
38. Duty Station Code
02 1130-110
39. Duty Station
Juneau, Juneau, AK

40. Agency Data 41. Ret Stat.
CLS 00 M
42. Educ.. Lvl. 43. TPV. JND.
44. Position Sensitivity
NonCritical Sensitive

45. REMARKS

LUMP-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE.
EMPLOYEE IS ENTITLED TO INDIAN PREFERENCE AS DEFINED BY THE SEC OF INTERIOR.
CODE "K" IN BLOCK 30 INDICATES COVERAGE BY FERS AND FICA
REASON FOR RESIGNATION: PENDING SEPARATION DUE TO RIF
FORWARDING ADDRESS: P.O.BOX 32722
JUNEAU, AK 99803
RIF NOTICE DATED: 10-11-95
ENTITLED TO $4481.52 SEVERANCE PAY FUND TO BE PD AT THE RATE OF $739.98 PER WEEK OVER 07 WEEKS BEGINNING FIRST NORMAL WORKDAY AFTER SEPARATION.

46. Employing Department or Agency
INT-BUR of Indian Aff

47. Agency Code
IN06

48. Personnel Office ID
1162

49. Approval Date
01-22-96

50. Signature/Authentication and Title of Approving Official 5TI02EE08880

S/_____

E. DENISE GOODFACE
PERSONNEL OFFICER

Standard Form SF-50B

NOTIFICATION OF PERSONNEL ACTION

1. Name
Jones, Sr., Clifford W.
2. Social Security Number 3. Date of Birth
444-52-3825 08-24-51
4. Effective Date
11-23-97

FIRST ACTION

5-A. Code	5-B. Nature of Action
140	REINS-CAREER
5-C. Code	5-D. Legal Authority
KGM	REG. 315.401
5-E Code	5-F. Legal Authority
6-A. Code	6-B. Nature of Action
6-C Code	6-D. Legal Authority
6-E. Code	6-F. Legal Authority

7. FROM: Position Title and Number
8. Pay Plan 9. Occ. Code
10. Grade Level 11. Step/Rate
12. Total Salary 13. Pay Basis
14. Name and Location of Position's Organization
15. TO: Position Title and Number
BUDGET ANALYST P-8361
16. Pay Plan 17. Occ. Code
GS 0560
18. Grade Level 19. Step/Rate
09 10
20. Total Salary 21. Pay Basis
$40,300 PA

22. Name and Location of Position's Organization
PHS, IHS, PHOENIX AREA OFFICE, FORT YUMA SERVICE UNIT, PHS INDIAN HOSPITAL, YUMA, AZ., HOSPITAL HEALTH, HOSPITAL ADMINISTRATIVE SERVICES HGFLK222

EMPLOYEE DATA

23. Veterans Preference
1-None

24. Tenure
1-Permanent

25. Agency Use
1

26. Veterans Preference for RIF
X-No

27. FEGLI
C-BASIC ONLY

28. Annuitant Indicator
9 NOT APPLICABLE

29. Pay Rate Determinant
0

30. Retirement Plan
K-FERS and FICA

31. Service Comp. Date
09-19-92

32. Work Schedule
F-Full Time

POSITION DATA

34. Position Occupied
1

35. FLSA Category
E

36. Appropriation Code
8J401305 05857

37. Bargain Unit Status
0355

38. Duty Station Code
064242025

39. Duty Station
WINTERHAVEN, CALIFORNIA

40. Agency Data	41. Ret Stat.
	8
42.	43.
0900	11-23-97
44.	
13 84 520301	

45. REMARKS

SELECTED FROM PHIHS 97-158 DATED 09-30-97.
EMPLOYEE ENTITLED TO INDIAN PREFERENCE.
PREVIOUSLY EMPLOYED AT GS-11 STEP 04
INITIAL PROBATIONARY PERIOD COMPLETED.
POSITION IS AT THE FULL PERFORMANCE LEVEL.
ITEM 31 SUBJECT TO CHANGE UPON VERIFICATION OF PRIOR SERVICE.
SALARY INCLUDES A LOCALITY-BASED PAYMENT OF 4.81%.
APPOINTMENT AFFIDAVIT EXECUTED 112497.

46. Employing Department or Agency
DEPARTMENT OF HEALTH AND HUMAN SERVICES

47. Agency Code
HE37

48. Personnel Office ID
1372

49. Approval Date
11-21-97

50. Signature/Authentication and Title of Approving Official

S/_____

RICHARD B. GERRY, JR.
AREA PERSONNEL OFFICER